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To Strengthen the ICC Office of the Prosecutor, Karim Khan is On the Right Path

by Justice Richard Goldstone
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The recent announcement by the Government of Sudan that it intends to hand over former President Omar Al-Bashir and other suspects to the International Criminal Court ("ICC" or the "Court") has the potential to be a watershed moment for the Court, and for international justice. The Darfur situation has long been a barometer of the Court's success, offering the prospect for accountability for the gravest crimes while presenting fundamental challenges towards this effort. The Sudan cases, as well as the Court's ongoing preliminary examinations, investigations, and trials in situations ranging from Libya, Mali, Venezuela, Central Africa Republic, and the Philippines will define the next chapter of the ICC.

It is imperative for the future of international criminal justice for this next chapter to be a successful one, and this effort took a large step in the right direction with the recent election of Karim A.A. Khan QC as chief prosecutor. In fact, it was during his visit to Sudan that the government's foreign minister announced the decision to hand over Bashir, though the process still requires some steps towards fulfillment.

I have had the opportunity to speak with Prosecutor Khan, and I am convinced he is on the right path with his vision for the structure and functioning of the Office of the Prosecutor ("OTP" or the "Office"), a path designed to deliver measurable success in the courtroom. Central to the prosecutor's vision of success for the OTP is a move to a structure of two deputy prosecutors.

At the end of 2019, the Assembly of States Parties established the Independent Expert Review (IER). It consisted of a panel of nine international experts which I had the opportunity to chair. Its mandate was to comprehensively review the ICC and the Rome Statute system. It was established in consequence of many criticisms of the work and organization of the three organs of the ICC – the registry, the chambers and the OTP. The IER issued its final report in September 2020. It contained 384 recommendations many of which related to the OTP.

One of the issues considered by the IER was whether the chief prosecutor should structure the office with the appointment of two deputy prosecutors. Different models were considered during the review: a structural model where one deputy prosecutor would be assigned to overseeing investigations, while the other would oversee prosecutions, or alternatively, where one deputy prosecutor would be assigned to manage operational matters (investigations and prosecutions) and a second one would oversee the administration of the OTP.

Ultimately, having not been persuaded by these specific models, the panel did not recommend their adoption. It was recommended instead that the roles and responsibilities of the sole deputy prosecutor should be clarified and refined and that some of the inefficiencies and gaps identified during the review be resolved.

`An Innovative Approach'

Prosecutor Khan has, however, adopted an innovative approach to the issue of deputy prosecutors, one that was not considered in the IER report. Upon a careful reading of the deputy prosecutor job descriptions, and benefitting from conversations I have had with Khan, I am convinced that the new chief prosecutor offers an outstanding roadmap for his office, reorganized under two new prosecution pillars, each headed by a deputy prosecutor.

The prosecution pillars will divide investigations and trials between the deputy prosecutors considering caseload, geographic, linguistic, and other factors where applicable. This new approach is a logical and necessary evolution of the current "integrated teams" model that was developed comparatively recently by former Chief Prosecutor Fatou Bensouda. It incorporates and unifies in each team the expertise necessary for investigations and prosecutions. It does this by merging trial lawyers, investigators, analysts, and international cooperation advisers together into unified teams and dispenses with the multiple reporting lines that had hitherto existed across divisions.

An Integrated Services Division is proposed to centralize and streamline the support functions provided to the two prosecution pillars through the provision of specialized expertise and services.

In my professional judgment, the proposed structure makes good sense and, if implemented, I believe it will bring numerous tangible benefits to the effective functioning of the office. The structure effectively incorporates a number of the recommendations made by the IER. I say this, principally, for five reasons.

More Unified Prosecution Teams

First, as mentioned, the idea of two deputy prosecutors, each in charge of separate but more unified prosecution teams, with clearly defined roles and responsibilities, makes sense from an organizational point of view. It is an imaginative, workable model for the reorganization of the OTP – very much, the engine of the Court – that has merit and deserves support.

Close and effective coordination between the two prosecution pillars will be key to the well-functioning of this new model. I am pleased to see that this requirement and interplay between the two pillars has been duly considered and factored in the proposed model.

Second, under this model of reorganization, each prosecution pillar is headed by a most senior and experienced deputy prosecutor who, under the authority of the chief prosecutor, ensures efficient decision making, and oversees enhanced standardization of working methods, workflows, lessons learned, and overall quality control.

Third, the new structure will help hold senior management accountable while encouraging a hands-on style of management in the daily core functions and activities of the Office, effectively bringing the deputy prosecutors closer to staff.

Fourth, while the appointment of a second deputy prosecutor will increase costs in the Office's budget (some170,000 Euros annually), the returns of that investment are immeasurable. The two deputy prosecutors managing the prosecution pillars in the envisaged structure will result in considerable efficiencies, and anticipated output, across the board, giving States Parties that support the ICC's budget real value for money. This new vision for the OTP structure is otherwise largely budget neutral. There would be efficient savings in consequence of avoiding multiple lines of reporting and control. .

Finally, I very much welcome the notion that the new structure aims to incorporate and adopt greater geographical, linguistic, and contextual expertise and competence, making more effective and bespoke use of the resources and talent pool at the OTP. This trend also extends to gender balance – a proven driver of performance, especially when women occupy more senior-level positions within an organization. Here, I think it is significant that the vacancy announcement for the post of the two deputy prosecutors places added emphasis on the recruitment of female candidates, geographical representation, and those who represent different legal systems of the world.

A Stronger Office of the Prosecutor

The chief prosecutor has conveyed to me that all changes have been made in alignment with ICC Human Resources policies and guidelines and clearly communicated to all staff. In particular, any staff member whose posts will be affected has been notified and will be free to apply for the newly established posts. The reality, however, is that this proposal will not result in staff losing their jobs. In most cases, it is more a case of utilizing them more effectively.

As a result of my personal exchanges with Khan, I have come to better appreciate the proposal, and find it all the more compelling and a solid basis on which to make the OTP stronger and more efficient in the delivery of its crucial mandate.

As someone who directly oversaw the creation the first prosecution office at the *ad hoc* United Nations International Criminal Tribunals for the former Yugoslavia and Rwanda, and who has since followed with keen interest the evolution of prosecution offices charged with the investigation and prosecution of international crimes at the international level, I have learned a thing or two in the process – about what works and what pitfalls to avoid.

Change for the sake of change is vacuous, but necessary change can re-energize and reinvigorate to induce impressive results.

In my judgment, Khan's vision for a revitalized Office of the Prosecutor at the ICC – equipped with two deputy prosecutors, each managing a separate prosecution pillar under the unified teams model – represents a genuine attempt to make his Office

more efficient, results-oriented, and accountable. It is a sincere effort to make bold but necessary changes to do better in the service of the Rome Statute, and for those who look to the Court as a last beacon of hope for justice. He deserves our full support in that honorable effort.

(*This article is written in the author's personal capacity and not as a former chair or member of the Independent Expert Review Committee).*

IMAGE: Prosecutor of the International Criminal Court (ICC) Karim Khan holds a press conference at the Ministry of Justice in the Sudanese capital Khartoum on August 12, 2021. Sudan and the International Criminal Court signed a cooperation deal that would pave the way for deposed autocrat Omar al-Bashir and his aides to be handed over to the Hague-based body. (Photo by EBRAHIM HAMID/AFP via Getty Images)

About the Author(s)

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Justice Richard Goldstone was the Chair of the Panel of Experts, which undertook the first comprehensive Independent Expert Review of the International Criminal Court and the Rome Statute System. He is the founding Chief Prosecutor of the United Nations International Criminal Tribunals for the former Yugoslavia (UN-ICTY) and Rwanda (UN-ICTR), and a former Judge of the Constitutional Court of South Africa.